Petition

81-1331

Office - Supreme Court, U.S.
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CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

COUNTY OF SAN DIEGO, a political subdivision of the State of California,

Petitioner,

v.

ALAN C. Nelson, ~~LEONEL J. CASTILLO,~~ Commissioner, Immigration and Naturalization Service; MARIO T. NOTO, Deputy Commissioner; EDWARD O'CONNOR, Western Regional Commissioner; JAMES J. O'KEFFE, San Diego District Director; DONALD CAMERON, Chief Border Patrol Agent, Sector No. 11; GRIFFIN BELL, Attorney General; UNITED STATES OF AMERICA; IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is there authority under the Federal Tort Claims Act to support a claim for damages for failure of the United States to properly perform its duties in preventing the entry of illegal aliens into the United States?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT THE CLAIM FOR DAMAGES IS NOT BARRED BY SOVEREIGN IMMUNITY AND IS ALLOWABLE UNDER THE FEDERAL TORT CLAIMS ACT	5
CONCLUSION	9
ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA	Appendix A
MEMORANDUM OF OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	Appendix B

TABLE OF AUTHORITIES

Cases

Page

Indian Towing Co. v. *United States* (1955)
350 U.S. 61, 100 L.Ed. 48 8

Oregon v. *United States* (9th Cir. 1962) 308 F.2d 568,
cert. denied, (1963) 372 U.S. 941 ..... 4, 6, 9

People of the State of California v. *United States*
(9th Cir. 1962) 307 F.2d 941, *cert. denied,* (1963)
372 U.S. 941 ..... 4, 6, 8, 9

Pirie v. *Chicago Title & Trust Co.* (1901)
182 U.S. 438, 45 L.Ed. 1171 6

Rayonier, Inc. v. *United States* (1957)
352 U.S. 315, 1 L.Ed.2d 354 6

United States v. *Sherwood* (1941)
312 U.S. 584, 85 L.Ed. 1058 5

United States v. *Testan* (1976)
424 U.S. 392, 47 L.Ed.2d 114 5

Statutes

United States Code

8 U.S.C. § 1101 et seq. 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1346(b) 2, 5

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LEONEL J. CASTILLO, Commissioner, Immigration and Naturalization Service; MARIO T. NOTO, Deputy Commissioner; EDWARD O'CONNOR, Western Regional Commissioner; JAMES J. O'KEFFE, San Diego District Director; DONALD CAMERON, Chief Border Patrol Agent, Sector No. 11; GRIFFIN BELL, Attorney General; UNITED STATES OF AMERICA; IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, County of San Diego, a political subdivision of the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 16, 1981.

OPINION BELOW

The opinion of the United States District Court for the Southern District of California, attached hereto as Appendix A to this Petition, was affirmed by the United States Court of Appeals for the Ninth Circuit, attached hereto as Appendix B.

JURISDICTION

The order of the United States District Court for the Southern District of California granting Respondent's Motion to Dismiss the Complaint was entered on February 6, 1980. The judgment of the United States Court of Appeals for the Ninth Circuit affirming said order was entered on October 16, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S. Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent statutory provision involved is 28 U.S. Code Section 1346(b), which provides:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

On July 12, 1979, County of San Diego, a political subdivision of the State of California, filed a Complaint in the United States District Court for the Southern District of California against the United States of America, the Immigration and Naturalization Service of the United States (I.N.S.), and their present and former officers. The Complaint alleged that such defendants were negligent in the administration and enforcement of the Immigration and Naturalization Act (8 U.S. Code § 1101 et seq.) and other immigration laws in allowing illegal aliens to enter into and remain in the United States. Specifically, they were negligent in allowing aliens into the County of San Diego, in failing to take custody of such illegal aliens, and in failing to provide for their health care. The Complaint further alleged that as a direct result of these negligent acts and omissions, the County of San Diego had been damaged in the amount of $1.8 million, which represented the amount of public funds expended by the County of San Diego in providing health care for illegal aliens during the fiscal years 1976 and 1979. The Complaint also sought declaratory and injunctive relief.

Defendants filed a Motion to Dismiss on the grounds that the District Court lacked jurisdiction of the subject matter and that the Complaint failed to state a claim upon which relief could be granted. The Motion to Dismiss was granted and the Order was entered on February 6, 1980 (see Appendix A). Thus, for purposes of the Motion to Dismiss, the allegations of the Complaint were deemed true. The District Court ruled that sovereign immunity barred plaintiff's damage claim and was not waived by the Federal Tort Claims Act because there was no claim for "injury or loss of property," but merely for expenses (loss of money) incurred in providing health care. The District Court

relied on *People of the State of California* v. *United States* (9th Cir. 1962) 307 F.2d *cert. denied,* (1963) 372 U.S. 941 and *Oregon* v. *United States* (9th Cir. 1962) 308 F.2d 568, *cert. denied,* (1963) 372 U.S. 941. In these cases, the distinction was made between loss of property because of fire, which would be compensable under the Federal Tort Claims Act, and expenses incurred in fighting a fire to prevent loss of property, which was non-compensable.

Injunctive relief was denied on the grounds that judicial review was not available for discretionary functions of the Attorney General.

The County of San Diego filed an appeal in the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the District Court on October 16, 1981 (Appendix B). From this judgment, Petitioner seeks the within Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE CLAIM FOR DAMAGES IS NOT BARRED BY SOVEREIGN IMMUNITY AND IS ALLOWABLE UNDER THE FEDERAL TORT CLAIMS ACT.

The doctrine of sovereign immunity provides that "the United States, as sovereign, is immune from suit as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood* (1941) 312 U.S. 584, 586, 85 L.Ed. 1058; *United States* v. *Testan* (1976) 424 U.S. 392, 399, 47 L.Ed.2d 114. A waiver of this immunity "cannot be implied but must be unequivocally expressed." *Ibid.*

Indeed, such waiver has been unequivocally expressed in 28 U.S. Code Section 1346(b), more commonly known as the Federal Tort Claims Act, which provides in pertinent part:

> ". . . (b) Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for *money damages,* accruing on and after January 1, 1945, *for injury or loss of property,* or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [Emphasis added.]

The case at bar is a case for 'money damages for loss of property,' thus clearly invoking the above section. The County of San Diego has lost in excess of $1.8 million in providing health care to illegal aliens. It is basic that money is property; therefore, loss of money is loss of property. The law has re-

mained unchanged on this issue since *Pirie* v. *Chicago Title & Trust Co.* (1901) 182 U.S. 438, 45 L.Ed. 1171. In this case, the Supreme Court stated:

> ". . . We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. *Money is certainly property, whether we regard any of its forms or any of its theories.* It may be composed of a precious metal, and hence valuable of itself, gaining little or no additional value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it." [Emphasis added.] *Id.* at 443-444.

The concept that money is property was erroneously ignored in *People of the State of California* v. *United States, supra,* 307 F.2d 941, and *Oregon* v. *United States, supra,* 208 F.2d 568, upon which the District Court in this case based its decision. These cases held that the United States could not be sued by states to recover expenses incurred for fighting a fire which had negligently spread from federal land, since a claim for expenses to protect property did not constitute a claim for 'injury or loss of property' under the Federal Tort Claims Act.

The Court of Appeals in *People* v. *United States, supra,* 307 F.2d 941, failed to properly distinguish the case of *Rayonier, Inc.* v. *United States* (1957) 352 U.S. 315, 1 L.Ed.2d 354, which held the United States liable under the Federal Tort Claims Act for damages done as a result of negligent firefighting by the United States Forest Service personnel. The Supreme Court reasoned:

". . . [T]he *very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.* The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility that a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. *But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. And for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it were subject to liability for the negligence of its firemen.* There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." (Emphasis added.) *Id.* at 319-320.

The reasoning in this case is applicable to the case at bar. The County is similar to a municipality. It has had to and will continue to expend its limited fiscal resources for health care of illegal aliens who are living in the County and who were either allowed to enter this country or were not cared for due to the negligence of federal employees. The language and purpose of the Federal Tort Claims Act are clear. Any damages resulting from Respondents' negligence should rightfully be paid by the federal government so that the resulting burden is not borne by one county, but is evenly spread among the nation's taxpayers, resulting in little or no hardship to anyone.

The Court in *People* v. *United States, supra,* 307 F.2d 941, also ignored the purpose of the Federal Tort Claims Act which was clearly defined in *Indian Towing Co.* v. *United States* (1955) 350 U.S. 61 at 68-69, 100 L.Ed. 48:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."

Therefore, since a claim has been stated for money damages due to loss of property, the claim of the County was properly brought before the District Court under the Federal Tort Claims Act.

CONCLUSION

The claim for damages of the County of San Diego is not barred by sovereign immunity, since it involves a loss of property or money under the Federal Tort Claims Act which acts as a waiver of sovereign immunity. Money is property, so the holding otherwise of the District Court and the Court of Appeals based on the erroneous decisions of *People* v. *United States* and *Oregon* v. *United States* cannot stand. This case presents an important issue relating to the proper interpretation of the Federal Tort Claims Act. The lower courts have, in effect, read an exemption into the Federal Tort Claims Act by tortuiously construing the word property to not include a loss of money resulting from the negligent acts or omissions of the United States.

It is respectfully submitted that a writ of certiorari should issue to review the judgment below.

DATED: January 14, 1982

Respectfully submitted,

DONALD L. CLARK, County Counsel
LLOYD M. HARMON, JR., Chief Deputy
BY

JANET B. HOUTS, Deputy
Attorneys for Petitioner

IN THE
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OCTOBER TERM, 1981
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LEONEL J. CASTILLO, Commissioner, Immigration and Naturalization Service; MARIO T. NOTO, Deputy Commissioner; EDWARD O'CONNOR, Western Regional Commissioner; JAMES J. O'KEFFE, San Diego District Director; DONALD CAMERON, Chief Border Patrol Agent, Sector No. 11; GRIFFIN BELL, Attorney General; UNITED STATES OF AMERICA; IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES.

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1982, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage prepaid, to each of the following named persons:

THE HONORABLE REX LEE
Solicitor General of the United States
Department of Justice
Washington, D.C. 20001

WILLIAM H. KENNEDY, United States Attorney
Office of the United States Attorney
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United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189

I further certify that all parties required to be served have been served.

DONALD L. CLARK, County Counsel
LLOYD M. HARMON, JR., Chief Deputy
BY
JANET B. HOUTS, Deputy
Attorneys for Petitioner

Appendix

(Filed and entered February 6, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN DIEGO, *Plaintiff,* v. LEONEL J. CASTILLO, et al., *Defendants.*	Civil No. 79-0827-GT ORDER

Plaintiff, the County of San Diego, charges defendants with negligently permitting illegal aliens to enter and to remain in San Diego County. Plaintiff further alleges that defendants wrongfully refuse to take custody of aliens in San Diego County and to provide health care to those illegal aliens who are not already in the actual physical custody of defendants. Because of defendants' negligence, plaintiff alleges that it must continually provide for the health care needs of aliens who remain illegally within its jurisdiction.

Plaintiff seeks damages for the costs it has incurred in providing health care to aliens during the past 3½ years. Plaintiff also seeks an injunction to restrain defendants from refusing to take custody and to provide health care to aliens, from refusing to reimburse the county for its costs and from enforcing Regulation 8 C.F.R. §242.3(b). In addition, plaintiff seeks a writ of mandamus compelling defendants to guard the border, to arrest illegal aliens, to provide health care needs and to rescind 8 C.F.R. §242.3(b). Finally, plaintiff seeks a declaratory judgment to the effect that defendants have the duty to guard the border, to take custody of illegal aliens and to provide them with health care,

that 8 C.F.R. §242.3(b) is unlawful, arbitrary and capricious, and that defendants must reimburse the county for health care services it has provided to illegal aliens.

Defendants have moved to dismiss the complaint on the grounds that the court lacks subject matter jurisdiction and that the complaint fails to state a claim for which relief can be granted.

DAMAGES

Plaintiff's claims for damages are barred by the doctrine of sovereign immunity. The United States can be sued only with its consent. *United States v. Testan,* 424 U.S. 393, 399 (1976). A suit against a federal agency or official is deemed a suit against the United States if the relief would operate against the sovereign. *Hawaii v. Gordon,* 373 U.S. 57, 58 (1963). Should plaintiff recover damages based upon defendants' alleged conduct, the judgment would operate against the United States as it would be paid from the public treasury. *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682 (1949). Therefore, plaintiff needs a waiver of sovereign immunity on which to base this action.

Plaintiff relies on 28 U.S.C. §1346(b), the Federal Tort Claims Act, for the waiver of sovereign immunity. §1346(b) gives district courts exclusive jurisdiction of civil actions on claims against the United States for money damages "for injury or loss of property, or personal injury or death" caused by government employees' negligent or wrongful act or omission.

Plaintiff has not alleged an "injury or loss of property." Therefore, §1346(b) does not confer jurisdiction. Plaintiff asserts that the expenses it has incurred in providing health care for illegal aliens constitute "property loss" within the meaning of the Federal Tort Claims Act. Two Ninth Circuit cases, however, hold

precisely the opposite on analogous facts. *California v. United States,* 307 F.2d 941 (9th Cir. 1962), *cert. denied,* 372 U.S. 941 (1963) and *Oregon v. United States,* 308 F.2d 568 (9th Cir. 1962), *cert. denied* 372 U.S. 941 (1963) involved suits by the states to recover expenses they had incurred in fighting, controlling and extinguishing a fire which had spread from federal land due to the negligence of United States Forest Service employees. The court distinguished the claims for expenses incurred in fighting the fire from damages to property. The court held that a claim for recovery of expenses incurred did not constitute a claim for damage or injury to property within the meaning of the Tort Claims Act. Therefore, the district court had no jurisdiction.

The instant case involves a claim for expenses incurred in providing health care services to illegal aliens. This court is compelled to follow the above Ninth Circuit authorities. Plaintiff's claims for damages are dismissed for lack of jurisdiction.

INJUNCTIVE RELIEF

Restraining defendants from refusing to take custody of illegal aliens in San Diego County.

8 U.S.C. §1252(a) provides: "Pending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody." This section is permissive, not mandatory. *See Manguerra v. INS,* 390 F.2d 358 (9th Cir. 1968).

The government admits that illegal aliens ordinarily are not kept in custody unless they pose a danger to public safety or are likely to abscond. If plaintiff was protesting the government's failure to take particular aliens into custody, the government's decision could be reviewed against such a standard. However,

plaintiff seems to be seeking review of the government's overall policy regarding the arrest and release on bond or conditional parole of illegal aliens. This policy is committed to the discretion of the Attorney General and is unreviewable.

Restraining defendants from refusing to provide health care services to illegal aliens not taken into custody.

28 U.S.C. §1252(c) directs the Attorney General "to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain . . ." 42 U.S.C. §249(c) authorizes public health service care for aliens detained by the INS.

Plaintiff seeks an injunction which in effect would compel the government to provide health care services to those illegal aliens who are not in custody. Since the government is not required to furnish such services unless the aliens are in custody, plaintiff is actually seeking review of the government's policies and decisions regarding the arrest and detention of illegal aliens. These overall policies are not subject to judicial review.

Restraining defendants from refusing to reimburse San Diego County for costs incurred in providing health care services to illegal aliens.

The complaint alleges that defendants refuse to reimburse plaintiff for its damages. The damages referred to are the public funds used to provide health care services to illegal aliens. However, the court does not have jurisdiction to award these damages. Therefore, this portion of the complaint fails to state a claim for which relief can be granted.

Restraining defendants from enforcing the provisions of 8 C.F.R. §242.3(b).

As set forth above, 8 U.S.C. §1252(c) directs the Attorney

General "to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain. . . ." The challenged regulation provides that an alien confined in an institution or hospital shall not be accepted into physical custody by the INS until deportation by order is imminent. The regulation further provides that when an alien is an inmate of a public or private institution at the time deportation proceedings commence, expense for the maintenance of the alien shall not be incurred by the United States until the INS assumes actual physical custody. Plaintiff contends that the promulgation of this regulation was arbitrary and capricious and beyond defendants' statutory authority. Plaintiff seeks to enjoin enforcement of this regulation.

The mandatory language of §1252(c) pertains to the Attorney General's duty regarding aliens taken into custody. As to those aliens, appropriate places of detention are to be provided. The challenged regulation sets forth policies regarding the timing of taking already-confined aliens into federal custody. Since the Attorney General is given discretion by §1252(a) to determine whether to arrest and take aliens into custody at all, there is no "law to apply" to provide a standard by which to review this regulation as to *when* certain aliens are to be taken into custody.

WRIT IN THE NATURE OF MANDAMUS

Judicial review is not available for the reasons set forth with regard to injunctive relief.

DECLARATORY JUDGMENT

A declaratory judgment is merely an additional remedy in cases of which the court has jurisdiction. Because jurisdiction is lacking in this case, the declaratory judgment remedy is not available.

Defendants' motion to dismiss is granted.

IT IS SO ORDERED.

Dated: February 5, 1980

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR., Judge
United States District Court

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(Filed October 16, 1981)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SAN DIEGO *Plaintiff-Appellant,* vs. LEONEL J. CASTILLO, Commissioner of Immigration and Naturalization Service, et al., *Defendant-Appellee.*	No. 80-5271 D. C. No. 79-0827 MEMORANDUM

Appeal from the United States District Court
for the Southern District of California

J. Gordon Thompson, Jr., U.S. District Judge, Presiding

Argued and Submitted: October 9, 1981

Before: KENNEDY and PREGERSON, Circuit Judges, and GRAY,* District Judge.

The correct and succinct opinion of the district court states all that is needed for a proper disposition of this case.

AFFIRMED.

*Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless the petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8½ x 11 inch paper, must show complete proof of service to all parties, and the original must contain an original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from the entry of judgment. Objections to the bill of costs by an adversary party must be filed within 7 days thereafter (see attached form).

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A *timely* petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

CA9-086 (8/27/80)

Opposition

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

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Oregon v. *United States*, 308 F. 2d 568, cert. denied, 372 U.S. 941 2

People of the State of California v. *United States*, 307 F. 2d 941, cert. denied, 372 U.S. 941 ..... 2, 3

Ray v. *United States*, 402 F. Supp. 40 3

Rayonier, Inc. v. *United States*, 352 U.S. 315 ... 3

Redmond v. *United States*, 518 F. 2d 811 4

Smith v. *United States*, 375 F. 2d 243, cert. denied, 389 U.S. 841 4

State of Idaho ex rel. Trombley v. *United States Department of the Army*, No. 80-3415 (9th Cir. Jan. 28, 1982) 2

United States v. *Batchelder*, 442 U.S. 114 4

United States v. *Nixon*, 418 U.S. 683 4

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 1

28 U.S.C. 2680(a) 3

28 U.S.C. 1346(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

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COUNTY OF SAN DIEGO, PETITIONER

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ALAN C. NELSON, COMMISSIONER,
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner argues that the court of appeals erred in holding that the United States is not liable under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for expenses incurred in providing health care to aliens who, because of the alleged negligence of the Immigration and Naturalization Service, have been able to enter and remain in the country illegally.

1. Petitioner filed the instant suit under the Federal Tort Claims Act in the United States District Court for the Southern District of California against the United States and various officials and agencies of the government (Pet. App. 1). The suit alleged that the Immigration and Naturalization Service and its employees had negligently failed to perform their statutory duty to keep illegal aliens out of the

country and that because of this negligence petitioner has been required to expend substantial sums of money to provide health care to these illegal aliens (*ibid.*).[1]

The district court (Pet. App. 3) dismissed the suit for lack of subject matter jurisdiction. It held that the claim was not one for "injury or loss of property" within the meaning of 28 U.S.C. 1346(b). In so holding, the court followed two prior Ninth Circuit decisions, *People of the State of California* v. *United States*, 307 F. 2d 941 (1962), cert. denied, 372 U.S. 941 (1963), and *Oregon* v. *United States*, 308 F. 2d 568 (1962), cert. denied, 372 U.S. 941 (1963), in which the court of appeals rejected suits against the United States for expenses incurred in fighting a fire that the government had negligently failed to extinguish. See also *State of Idaho ex rel. Trombley* v. *United States Department of the Army*, No. 80-3415 (9th Cir. Jan. 28, 1982).

The court of appeals affirmed on the basis of the "correct and succinct opinion of the district court" (Pet. App. B).

2. Petitioner asserts (Pet. 5-6) that the courts below erred in failing to recognize that money is "property" and therefore the expenditure of money to care for the aliens is a claim for "loss of property" within the meaning of the jurisidictional provision of the Federal Tort Claims Act. Petitioner's argument, however, ignores the context in which the term "property" is used in Section 1346(b).

The statute requires "injury or loss of property." The Ninth Circuit has properly construed that phrase as limited to losses incurred from actual injuries to the person or property of the plaintiff as a result of the government's

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[1]Petitioner also sought injunctive and declaratory relief, as well as similar relief by way of a writ of mandamus, in the district court. Petitioner abandoned the mandamus issue on appeal and has petitioned this Court only regarding the damages issue.

negligent or otherwise wrongful act or omission. Thus, the Ninth Circuit recognized that property destroyed by a fire is recoverable under *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957), but that expenses incurred in extinguishing the fire are not. *People of the State of California* v. *United States, supra*, 307 F. 2d at 944. What the Ninth Circuit observed in 1962, in drawing this distinction, is equally true today: "we are unable to find a single instance in the history of litigation involving the Tort Claims Act where recovery was permitted in the absence of injury to [the plaintiff's] person or property." *Ibid.* See also *Ray* v. *United States*, 402 F. Supp. 40, 43 (D.S.C. 1975). Since the decision of the court of appeals is a reasonable interpretation of the relevant statutory language and does not conflict with the decisions of any other court, review by this Court is unwarranted.

3. In any event, petitioner's claim is plainly insubstantial for another obvious reason: the Federal Tort Claims Act excludes government tort liability for suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). This Court stated in *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953), that Section 2680(a) includes all "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion" (footnote omitted).

The governmental activities challenged by petitioner—the broad political, social and economic decisions made by the Attorney General and the INS in determining how best to carry out responsibilities imposed by the immigration laws within budgetary and other constraints—plainly fall within this category of functions, concerning which the

United States has not waived sovereign immunity under the Tort Claims Act. "[T]he Government has a duty to maintain law and order, but how best to fulfill this duty is wholly within the discretion of its officers, and § 2680(a) excepts from the Act both discretionary functions and discretionary duties." *Redmond* v. *United States*, 518 F. 2d 811, 816-817 (7th Cir. 1975). See also *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Smith* v. *United States*, 375 F. 2d 243, 246-247 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *Maffei* v. *Nieves-Reta*, 412 F. Supp. 43, 44 n.4 (S.D. Cal. 1976), aff'd, 549 F. 2d 807 (9th Cir. 1977) (table).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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